

ADDRESS
ON
Bankruptcy Legislation in Canada
DELIVERED BEFORE
THE CANADIAN
MANUFACTURERS' ASSOCIATION

BY
MR. D. E. THOMSON, Q.C.

29TH MARCH, 1900



TORONTO
DUDLEY & BURNS, PRINTERS
1900

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1900
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The EDITH *and* LORNE PIERCE
COLLECTION *of* CANADIANA



Queen's University at Kingston

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BANKRUPTCY LEGISLATION IN CANADA.

ALL bankruptcy legislation is based on two principles ; first, that the property of an insolvent belongs of right to his creditors, and ought to be fairly distributed among them ; and second, that the insolvent having made a full surrender of his property, and having fulfilled the other conditions prescribed by the law, should be released from future liability in respect of his debts. Both these principles are innovations on the common law of England, which left each creditor to take separate proceedings for the recovery of his debt, and which made no provision for either rateable distribution or compulsory discharge.

Since it is upon the law of England that the systems of all our Provinces, except Quebec, are based, it may be well before attempting to outline bankruptcy legislation in Canada to glance at its history in the mother land. The first English law on the subject was passed in the reign of Henry VIII, and was directed against debtors whether traders or not, who sought fraudulently to evade the payment of their debts, or as it was expressed in the Act "who craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or return to pay any of their creditors their debts and duties, but at their own wills and pleasures, consume the substance obtained by credit from other men for

their own pleasure and delicate living, against all reason, equity, and good conscience." Irrate creditors are sometimes inclined to think that notwithstanding the improvements of civilization, the genus here described is not yet quite extinct.

By a Statute passed in the reign of Elizabeth, the law of bankruptcy was restricted to traders, but bankrupts were still in effect treated as criminals. Various alterations were from time to time made in the law, but it was not until the reign of Queen Anne that any provision was made for the release of bankrupts from their debts upon surrendering their property and conforming to the directions of the law. All subsequent legislation on the subject continued to apply to traders only until 1861. The Act of that year, consolidating and amending the law, extended it to non-traders also. This departure appears to have worked satisfactorily; the subsequent consolidations in 1869 and 1883 following the Act of 1861 in that respect. Apart from these consolidations, the law has been amended from time to time, the more extensive amendments being those of 1887 and 1890. Notwithstanding the almost continuous parliamentary attention the subject has received in England since 1861, there would appear to have been no serious suggestion for a return to the former rule restricting the law to traders only.

Turning to the history of the subject in Canada, it will be more convenient first to refer to the Province of Quebec. In 1663 the Company of the One Hundred Associates abandoned to the King of France "the property and lordship of New France." Thereupon was passed the "Ordinance of 1663" conferring on the colony its first constitution. This quaint piece of legislation, after reciting the surrender of the concessions granted in 1628, the necessity for the "establish-

ment of justice" to secure the repose and happiness of the inhabitants of the colony, and the impossibility of effectually administering the laws from so great a distance, concludes that the King and his advisers "could not take a better resolution, than that of establishing a well-regulated justice and a grand council in the said country; . . . causing the same form of justice, as far as possible, to be kept there as is administered in our kingdom." This Sovereign Council was enjoined to judge all matters "according to the laws and ordinances of our kingdom, and to proceed as far as possible in the form and manner which is practised and maintained in the seat of our Court of Parliament at Paris." Subsequent ordinances faithfully followed this precedent, and the "custom of Paris" became the foundation of French Canadian law. This custom, based in its turn on the Roman Civil Law, had always recognized that when a debtor had not wherewithal to meet his obligations in full, what he had should be fairly divided amongst those having claims upon him. It failed to recognize however any right of the insolvent on full surrender to a discharge from further liability.

But Quebec (then Lower Canada) takes first place on this subject among the Provinces, not only by reason of the greater liberality of its common law, but because it was the first to cover the whole ground by statutory provision. After the breaking out of the rebellion of 1837, the Imperial Parliament suspended the constitution of the colony, and vested the government thereof in a Special Council appointed by the Crown. One of the early enactments of this Council was an "Ordinance concerning bankrupts and the administration and distribution of their estates and effects." This ordinance was modelled on the English bankruptcy laws then in force, and

like them was made applicable to traders only. The law thus promulgated ensured not only rateable distribution, but the debtor's right, in the absence of fraud, to a discharge after full surrender of his estate; as well as immunity from arrest for debt, and release therefrom if under arrest.

After the restoration of the constitution and the union of the Provinces of Lower and Upper Canada, the ordinance continued in force in the former Province until 1843, when it was displaced by a Statute, which with considerable amendment of details, extended the provisions of the ordinance to both Provinces.

The subsequent development of legislation on the subject, is intimately interwoven with the gradual mitigation and ultimate abolition of imprisonment for debt which the growth of humane feeling had rendered necessary. It would scarcely be profitable here to follow the intricacies of these changes. Broadly speaking, it may be stated that the bankruptcy law was in force in the two Provinces from 1843 to 1849; and that the Provinces were without a bankruptcy law from 1849 to 1864. In the latter year a new Statute was passed. In the meantime the subject had received considerable attention in England and the policy of restricting the law to traders, as we have already seen, had in 1861 been abandoned. Apparently the representatives of Upper Canada preferred to follow this new departure, while Lower Canada held to the former practice. The Act was accordingly made applicable in Lower Canada to traders only, in Upper Canada to all classes.

The Act of 1864 was still in force at Confederation (1867). By our Constitution (the British North America Act) "Bankruptcy and Insolvency" is one of the subjects

enumerated as coming within the exclusive authority of the Parliament of Canada. This is entirely in harmony with the scheme of federation adopted. Bankruptcy laws, whether applicable to all classes, or to traders only, must always owe their chief importance to trade. That the subject of trade was deemed by the framers of the constitution to be a national rather than a provincial one, is sufficiently indicated by the enumeration of the following other subjects as coming within the exclusive authority of the Parliament of Canada:—"The Regulation of Trade and Commerce"; "Navigation and Shipping"; "Currency and Coinage"; "Banking, Incorporation of Banks, and the Issue of Paper Money"; "Bills of Exchange and Promissory Notes." Further, it will be noted that the scheme was not like that of the American Republic, a union of States with the presumption on doubtful points in favor of state rights; but a fusion of Provinces, based on the reverse presumption of predominating central authority.

The Dominion Parliament took early cognizance of the jurisdiction thus conferred. The year following Confederation (1868) the House of Commons appointed a Select Committee to inquire into and report upon the insolvency laws in force in the several Provinces. In due time that Committee reported. As to the Province of Quebec the report acknowledges the principle of the common law, but reflects on the efficiency of administration in the following language:—"The right of the creditors of an insolvent to a just distribution of his assets among them all, has always been recognized by the law of Lower Canada, although the means under the common law of enforcing that right were cumbrous and expensive. The effects of the debtor could only be realized under execution, and by this process only the minimum price of the goods sold was obtained."

The following extracts from the same report, may be taken to fairly indicate the state of the law in New Brunswick and Nova Scotia, upon their admission to Confederation :—

“ In New Brunswick there is no bankrupt or insolvent law whatever, nor are there any provisions of law under which the estate and effects of a person unable to pay his debts, can be distributed among his creditors, otherwise than by the ordinary means of execution issued at the suit of those obtaining judgments ; nor under which the preferences and liens to which executions give rise under the common law and statute law can be avoided or set aside, for the benefit of creditors generally.

“ In Nova Scotia an Act is in force for the relief of insolvent debtors, but its operation is limited. It is rather a remedial measure intended to supplement and mitigate the law of imprisonment for debt, than a complete system of insolvent or bankrupt law, having for its object the discovery and realization of the assets of an insolvent, and his discharge from liability in consideration of the surrender of his property. . . .

“ The Act . . . seems to afford to any creditor effective means for compelling payment of the debt due him ; but its tendency must be to impede or entirely prevent the distribution of assets among creditors generally. And it affords no means by which on any conditions whatever a debtor once insolvent can be enabled to continue his business with any hope of ultimate success.”

The following session (1869) a new insolvency law was passed. The preamble recited that “ it is expedient that the Acts respecting bankruptcy and insolvency in the several

Provinces of Ontario, Quebec, New Brunswick and Nova Scotia be amended and consolidated and the law on those subjects assimilated in the several Provinces of the Dominion." That Act applied to traders only and continued in force until 1875, when a new measure was substituted, applicable "to traders and to trading co-partnerships and to trading Companies whether incorporated or not, except incorporated Banks, Insurance, Railway and Telegraph Companies." This was followed by an enumeration of employments deemed trades within the meaning of the Act.

The Act of 1875, amended from time to time, continued in force until 1880, when it was repealed. Since then we have had no Dominion Law on the subject, except the Winding-Up Act which was passed in 1882 and which applies to Banks, Insurance and Loan Companies, etc

Since the repeal of the Act of 1875 several attempts have been made to secure a general Dominion Law, but so far without success. The one which received the greatest amount of public attention was the Bill introduced in the Senate by Sir John Thompson's Government in 1894. As introduced the Bill was made applicable to non-traders as well as to traders. This evoked considerable opposition, resulting in an amendment limiting the measure to traders. The Bill passed the Senate, but received only its first reading in the Commons, and was withdrawn on the promise that it would be reintroduced the next session. Before Parliament again met death had deprived the country of the services of Sir John Thompson; and the Government of Sir Mackenzie Bowell which succeeded, while reintroducing the measure, did not press it.

Failing the full exercise by the Dominion Parliament of its jurisdiction on this subject, it has been left to the different

Provinces to provide such limited relief as their jurisdiction permitted, and as public opinion called for. In Quebec the old procedure has been revived, and from time to time amended. In an indirect way a debtor is compelled to make an assignment for the general benefit of his creditors; because while theoretically not bound to make an abandonment when demanded, he may on refusal be arrested on a *capias* and can obtain his release only by making the abandonment. Even if he should refuse, and remain in prison, rateable distribution may still be enforced by making what is called an opposition alleging the debtor to be insolvent. Hence in Quebec the right of creditors to rateable distribution of the proceeds of an insolvent's effects may be said to be thoroughly established. The method however is still cumbersome and expensive. A good commentary on such method, is the language of Montreal correspondents recently asked for some explanation of the apparently interminable delays in securing payment of moneys realized by a sheriff. These delays they say "are the result of the fearfully wonderful system of procedure which we have inherited from the French founders of this Province." Moreover there is under that complicated system, no means whereby a debtor may obtain release from liability, except with the concurrence of each individual creditor.

In Ontario rateable distribution has been secured in another way. The debtor may assign for the general benefit of creditors. If he refuses to do so, there is a qualified rateable distribution under what is known as the Creditors' Relief Act; whereby the former right of execution creditors to receive payment in the order in which their executions have been placed in the hands of the sheriff, has been abol-

ished, and on a levy being made an opportunity is given to other creditors, having overdue claims, to come in and share rateably.

The Province of Manitoba early followed Ontario's lead in legislating with reference to voluntary assignments, and against preferences, such legislation dating back to 1886, and while the Provincial Legislature has not abolished the right of priority among execution creditors, its law of attachment for the general benefit of creditors is more comprehensive than that of Ontario; and applies not only to absconding debtors, but to debtors transferring property to defraud their creditors, and some other cases not necessary to specify here.

In New Brunswick since the repeal of the Act of 1875, the law, except in the case of Companies covered by the Winding-Up Act, has remained as described in the report of the Parliamentary Committee of 1868, until 1895, when the Local Legislature passed an Act similar to the Ontario law relating to voluntary assignments and the avoidance of preferences. There is however no right of attachment for the general benefit of creditors, except in the case of absconding debtors; and there is no legislation similar to the Ontario Creditors' Relief Act. Consequently when a debtor does not choose to make a general assignment, creditors are left to their common law remedies, and their claims are paid in the order in which their executions reach the sheriff's hands.

In Nova Scotia the former order of things continued until 1898, when the Legislature passed a law governing voluntary assignments, and for the avoidance of preferences. There is in that Province no right of attachment, except in case of absconding debtors, and even this remedy does not there inure to the general benefit, creditors being paid in the

order of their attachments. Execution creditors are also paid in the order of their priority.

In the same year (1898) Prince Edward Island passed a similar Act, for regulating assignments and preventing preferences; but priority of executions still obtains.

In British Columbia the English common law system prevailed until 1897, when by two separate Acts the Legislature regulated the rights of parties under assignments for the benefit of creditors, and legislated against fraudulent preferences along the lines of the Ontario law. In the absence of an assignment however, executions are paid in the order of their priority.

In considering whether we ought to have a Dominion bankruptcy law, it must be borne in mind that some legal machinery is necessary, for dealing with the property, if not with the persons of insolvents. The question is, whether such machinery shall be provided by and be under the control of the Dominion Parliament, in which the constitution has vested the jurisdiction; or shall be provided by, and be under the control of Provincial Legislatures, which the constitution debars from any direct jurisdiction over the subject. Shall we have a uniform law for the whole Dominion, enacted by competent authority; or shall we have different laws in each Province, enacted by an authority which is hampered by limitations and doubts?

Since 1880 the Dominion Parliament, though clothed with plenary power, has in effect abdicated its authority, leaving the rights of the parties concerned to be wrought out under the diverse and necessarily defective laws of each Province. The result is confusion; injurious to our credit abroad,

oppressive to unfortunates at home, and out of harmony with our awakening national life.

We have spent millions, and are spending millions more, in improving our means of transportation by land and water, to the end that our trade between the Provinces, and with the outside world may be increased. We then leave the law on a subject vitally affecting such trade, in a state of incompleteness and confusion, which tends to defeat the purpose for which we have sacrificed so much.

We shall be told that our neighbors to the south have been many years without a national bankruptcy law. Yes but though their difficulties in framing and administering such a measure exceed our own, by reason of the relative weakness of the federal bond; and though their several states have ampler powers in this behalf than have our Provinces, Congress has at length realized the national character of this subject, and has yielded to the imperative need for uniformity of right and of administration throughout the Union.

But what sort of a law should we have? Should it provide for discharge of debtors, as well as for administration of assets? Has the rigor of our law in this respect since 1880 been in the aggregate a national gain, or a national loss? Some among us still believe that no debtor should be discharged from any debt without his creditors' consent. Their arguments are singularly like those by which imprisonment for debt used to be defended.

The preamble to one of our own Statutes on that subject passed fifty years ago, is in the following language:—"Whereas imprisonment for debt, where fraud is not imputable to the debtor, is not only demoralizing in its tendency, but is as

detrimental to the true interests of creditors, as it is inconsistent with that forbearance, and humane regard for the misfortunes of others, which should always characterize the legislation of every Christian country; and whereas it is desirable, to soften the rigor of the laws affecting the relations between debtor and creditor, as far as due regard for the interests of commerce will permit," etc. Suppose the opening words of that preamble altered, so as to make it apply to refusal of discharge to a debtor whom the law summarily strips of all his property, is the sentiment more lenient than the humane feelings of this generation should endorse?

It is often said that if we are to have a bankruptcy law it should, while securing absolute efficiency, reduce expense to a minimum. Here as elsewhere we get in the long run just what we pay for; and when the final balance is struck, the best is the cheapest. Simplicity and directness should ever be the aim, but after all the gun is not more important than the man behind the gun. The best law ever framed is useless, unless it is administered by intelligence and skill and these qualities are never cheap.

It is however a question whether the time has not come when the public should bear a larger proportion than hitherto, of the expense of providing adequate machinery for the administration of such a law. It is too much to ask creditors smarting under a sense of present loss, to be specially solicitous for that broad public interest which should be a prime consideration, in dealing, for instance, with the question of discharge. Still more unreasonable is it to expect that they should back up their solicitude by further diminishing their dividends to protect that public interest. It should rest with

the public rather than with the creditors of a particular estate, to secure such a firm administration of the law as will not subject to unfair competition, rival traders who are paying and desire to continue paying 100 cents on the dollar. What is a public duty should be discharged on the authority, and at the expense of the public.

Sometimes we are told that what we need is a simple Act of a few clauses. That reminds one of a simple Hoe printing press, made of a few bars of steel. A bankruptcy law from its very nature, deals with abnormal conditions. It must provide means for adjustments, infinite in number and variety ; hence it must always be one of the most intricate pieces of legislation that any parliament can be called upon to consider. Its framing requires the highest degree of skill, and the highest degree of knowledge of the subject, just as surely as does the designing of the most intricate piece of machinery known to the modern manufacturer. That consideration should however no more deter the nation, than it deters the manufacturer who scours the earth for talent to improve his facilities.

Taking for a moment a broader survey, what do we see ? Before our eyes, with a rapidity never before dreamed of, improved facilities of communication and transport are drawing the whole world close together. The world's commerce is the prize for which not only great manufacturers, but nations now strive. A world's public opinion, too, destined yet to wield a mightier power than armies and navies, is fast crystallizing. International law is slowly emerging from chaos ; and will never again contract its sphere. Inevitably it must keep pace with the ever widening scope of international commerce.

Our hearts beat high to-day in sympathy with England's military achievements; but after all, England's dominant instincts are not martial. It is essentially in the two realms of commerce, and law, that she has led the world for centuries, and leads it still. As mistress of the seas; as pioneer manufacturer; as the first of trading nations; all yield her the palm. But her supremacy as the world's law maker, is to-day more unquestionable, than is her place in the commercial world. Wherever civilization extends, her example and experience in constitutional government, in nearly all branches of jurisprudence, and especially in the interpretation and in the impartial administration of law, are the common fountain of inspiration for all lands.

With giant strides Canada has during recent years, been taking her place as a daughter worthy to share in the destiny of this prolific mother of nations. Has not the time come when we should take a leaf from the rich book of England's experience on the subject of bankruptcy legislation—a subject confessedly vital to modern national and international relations?



